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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LOUIS J. BRAQUET, ET AL.,

Petitioners

V.

THE ADMINISTRATORS OF THE

TULANE EDUCATIONAL FUND

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF

STATE OF LOUISIANA

JAMES A. WYSOCKI
Attorney of Record
Room 1410 First National
Bank of Commerce Building
New Orleans, Louisiana 70112
Phone: 504 586-9971

GERALD P. WEBRE, Co-Counsel
3408 Clearview Parkway
Metairie, Louisiana 70002
Phone: 504 888-0622

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

LOUIS J. BRAQUET, LOUISE LANGENDORF, STELLA TRAUTH, AGNES RONIGER, GEORGE C. BRAQUET, PETER E. BRAQUET, REGINA BRAQUET and FANNYE BRAQUET

Petitioners

V.

THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

QUESTIONS PRESENTED

1. Whether the Supreme Court of Louisiana in denying Certiorari on review of Court of Appeal, Fourth Circuit, State of Louisiana, misapplied the Doctrine of Separation of Church & State adhered to in both the United States Constitution (First Amendment) and the Louisiana State Constitution (Article 1 & 8).

2. Whether the petitioners were afforded equity under the Fourteenth Amendment of the United States regarding the ambiguous and erroneous application of La. Civ. Code Ann. art. 1712 (West 1983).

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The petitioners, Louis J. Braquet, Louise Langendorf, Stella Trauth, Agnes Roniger, George C. Braquet, Peter E. Braquet, Regina Braquet and Fannye Braquet, pray that a writ of certiorari issue to review the opinion and judgment rendered in these proceedings November 29, 1982.

OPINIONS BELOW

The Supreme Court of Louisiana, unreported, appears at Appendix A pp. 16, infra.

JURISDICTION

The denial of writs certiorari by the Louisiana Supreme Court was entered on November 29, 1982. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Amendment 1, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Amendment XIV § 1, "..nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

LOUISIANA STATE CONSTITUTION:

Article 1 § 8, "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof."

Article 8, Section 14: "The Tulane University of Louisiana in New Orleans is recognized as created and to be developed in accordance with Act No. 43 of 1884."

STATEMENT OF THE CASE

Plaintiffs, being collateral relations and only legal heirs of James Mitchell Rogers, have brought this action seeking revocation of his entire bequest (Succession of Rogers, 138 So.2d 251) due to the fact that Tulane has not met the onus of the will or the dictates of the Fourth

Circuit Court of Appeal, State of Louisiana, in Louis J. Braquet, et al v. The Administrators of the Tulane Educational Fund, 304 So.2d 720 (LA APP 4th Circuit 1974), appearing at Appendix C, pp. 35, supra. Judgment and reasons for judgment from this suit are the basis on this present suit.

In Braquet v. Tulane, supra, the defendant's delay of thirteen years was deemed and judged to be unjustified, unwarranted, inexcusable and totally unreasonable. It was stated in the reasons for judgment that the procrastination (beyond the 10-year period applicable in probate matters) and misactions by Tulane should have necessitated the awarding of the entire estate to the heirs at that time. However, the court granted Tulane an unprecedented "second chance" to comply with the terms of the will by erro-

neously applying La. Civ. Code Ann. art. 1559, 1710, 1712, which state:

ARTICLE 1559:

"Donations intervivos are liable to be revoked or dissolved on account of the following causes:

(1) the ingratitude of the donee;
(2) the non-fulfillment of the eventual condition, which suspend their consummation;
(3) the non-performance of the conditions imposed on the donee;
(4) the legal or conventional return."

ARTICLE 1710:

"The same cause which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation inter vivos, are sufficient to ground an action of revocation of testamentary dispositions;..."

ARTICLE 1712:

"In the interpretation for the last will, the intention of the testator must be principally endeavored to be ascertained, without departing from the proper signification of the terms of the testament."

The intent and application of Article 1712 is for unclear intent of testators and should be applied when the will is probated. The testator's intent in this legacy was always clear. Disregarding the above, on May 14, 1976, Tulane dedicated an admitted multipurpose building, designed, constructed, and employed as a multipurpose center. It is used predominately for non-chapel uses which violate the intent of the will, previously ruled to be "paramount." It violates further rulings in Braquet v. Tulane, supra, pp. 35, because only a small area of the structure is used for religious service. Even this small area is prevented from being used as a chapel by the multiple non-religious functions and by the fact that the building was kept locked. This negates the bequested use as a chapel, within its definition. Some of the sun-

dry usages are non-religious lectures, seminars, musical classroom, recitals, and others. The building incorporates a lounge, breezeway, rest rooms, offices, seminar room, kitchen, etc., none of which are part of a traditional chapel make-up as intended by the testator.

In addition, Tulane built the structure on land that is owned and/or controlled by the State of Louisiana. Title to the land was never transferred to Tulane. Yet, it houses the Judeo-Christian Chair of Religion in violation of the United States Constitution and the Louisiana Constitution. Certainly, the testator would not have intended his bequest to be changed, disregarded or used illegally. These are grounds for revocation under La. Civ. Code Ann. art. 1559 & 1710.

The Fourth Circuit Court of Appeal, unreported, Appendix B, pp.17 supra, affirmed the judgment of the Trial Court on July 30, 1982, rehearing denied on September 24, 1982. The Supreme Court of Louisiana denied writ of certiorari on November 29, 1982.

REASON FOR GRANTING THE WRIT

1. The decisions below directly relate to the principle of separation of church & state.

In Cantwell v. Connecticut, 310 U.S. 296 (1940), this court held that the religion clauses of the First Amendment were held applicable to the state governments as well as by the principle of the Fourteenth Amendment. The case at hand involves state owned land entrusted to Tulane for educational purposes only. When Tulane established a teaching Judeo-Christian Chair

of Religion on state land, it obviously violated the First Amendment of the Constitution of the United States. The court has repeatedly held that religious instruction of any type on state land is a violation of the Doctrine of Separation of Church & State. In Illinois ex/ rel. McCollum v. Board of Education, 333 U.S. 203 (1948), a public school, existing on state property, was used for religious instruction, violated this doctrine because the use of a tax supported property, as state lands are, for the purpose of disseminating religious teaching. Allowing state property, as Tulane has, to be used in aiding religious groups to teach their faith by lectures and seminars, etc., fall under the ban of the First Amendment.

This court in Everson v. Board of Education of Ewing TP, et al., 330 U.S. 1 (1947), a case involving the use of trans-

portation for pupils of both public and parochial schools, held:

> "...'establishment of religion' clause means, at least, that no tax in any amount, large or small, can be levied to support any religious activities, or instructions, whatever they may be called, or whatever form they may adopt to teach or practice religion."
>
> At page 16, Mr. Justice Reynolds said, "The First Amendment forbids any appropriations, large or small, from public funds to aid or support any and all religious exercises."
>
> "...in addition, the 'establishment of religion' clause means that the government, state or federal, cannot aid one religion or religions or prefer one over another."

This court in Zorach v. Clausen, 343 U.S. 306 (1952) in considering letting pupils free from public school in a released time situation in order to take religious instruction, emphasized that government may not finance religious groups nor undertake religious instruction, nor blend secular with sectarian education. (Emphasis added) Tulane, by establishing and housing a teaching Judeo-Christian Chair

of Religion on state land, violates the above mentioned principles. The Court has been clear in its interpretation that state government should not be involved in any preferential fostering of religious teaching. Tulane thus violated the First Amendment.

2. The decisions below directly relate to the Louisiana Courts failing to properly apply the Louisiana Civil Code on probate matters equitably depriving petitioner's of equal protection under the Fourteenth Amendment.

This court held in Frost v. Corporation Commission State of Oklahoma, et al., 278 U.S. 515 (1929), that the purpose of the equal protection clause is to rest the rights of all persons on the same rules under similar circumstances. Yet, the Louisiana Courts, which heard this instant case, and other related cases between same parties, have erroneously ap-

plied Louisiana Civil Code Articles 1559, 1710, 1712, which relate to the revocation of bequests and the intentions of the testator. Nor did the Louisiana Courts address or answer all of the allegations in the instant case, or give res adjudicata standing to those "findings of fact" in Braquet v. Tulane, supra, pp.

Mr. Roger's olographic will clearly stated that his bequest was for a non-sectarian chapel to honor his sister, Myra Clare Rogers, only. In Braquet v. Tulane, supra, pp. 35, it was ruled that a multipurpose center" was not what the testator had in mind" (Emphasis added) Yet, even after being given a "second chance", Tulane built a multipurpose center, housed a Chair of Religion therein, and deliberately designed the focal point of the building to be a six-foot diameter stained glass window, honoring Harriet Sophie Newcomb rather than Mr. Roger's

sister. Surely, the focal point of the Lincoln Memorial, for a comparative example, is not a statue of George Washington. Further, the building has never been marked "THE MYRA CLARE ROGERS MEMORIAL CHAPEL" as required in the onus of his will.

Tulane instituting the Judeo-Christian Chair of Religion violates the Louisiana Constitution, 1974, Article 14, Section 39, and all others which prohibit teaching and seminars of religion dating back to 1845, when the University of Louisiana (embryo of Tulane University) was created. Most importantly, they have violated Legislative Act No. 43 of 1884, which is the act that formulated the Administrators of the Tulane Educational Fund. These articles were listed in the instant case, but were ignored in the courts' rulings.

In reviewing the case at hand, petitioners believe that the judiciary subconsciously and unconsciously were inadvertently influ-

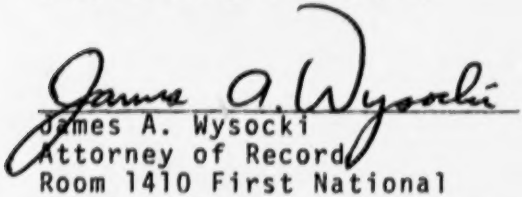
enced by Tulane University's magisterium and prestige in the legal-judicial community to the detriment of the petitioners.

The petitioners believe that they have not been granted equity under the law, nor a proper application of the law. Petitioners are confident that this Court will equitably assess the constitutionality of the questions before it.

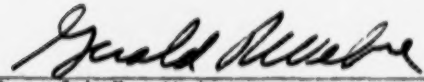
CONCLUSION

For these reasons, a writ of certiorari should issue to review the denial of writ by The Supreme Court of the State of Louisiana and to review the judgment and reasons for judgment of the Fourth Circuit Court of Appeal, State of Louisiana, unreported appearing at Appendix A pp. supra.

Respectfully submitted,



James A. Wysocki
Attorney of Record
Room 1410 First National
Bank of Commerce Building
New Orleans, Louisiana 70112
Phone: 504 586-9971



Gerald P. Webre
Co-Counsel
3408 Clearview Parkway
Metairie, Louisiana 70002
Phone: 504 888-0622

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, Notary Public, duly authorized and commissioned in the State and Parish aforesaid to take acknowledgements, personally appeared GERALD P. WEBRE, who, after being duly sworn, did state that he is an attorney for petitioners and that he has mailed three (3) copies of the Writ of Certiorari to the United States Supreme Court in the U. S. mail this 24th day of February, 1983 to

WILEY G. LASTRAPES
Attorney for Defendant
CHAFFE, McCALL, PHILLIPS
TOLLER & SARPY
1500 First NBC Building
New Orleans, Louisiana, 70112

Witness

Beverly Bauer

GERALD P. WEBRE

SWORN TO AND SUBSCRIBED before me, Notary Public, this 24th day of February, 1983.

KERRY P. CAMARATA

APPENDIX "A"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

NUMBER 82-C-2584

LOUIS J. BRAQUET, ET ALS

V.

THE ADMINISTRATORS OF
THE TULANE EDUCATIONAL FUND

- - - - - - - - - -

In Re: Louis J. Braquet, apply for Certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans, Number 13051, From the Civil District Court for the Parish of Orleans, Docket Number 77-6768

- - - - - - - - - -

November 29, 1982.

Denied.

FAB
JAD
PFC
WFM
JLD
JCW

Supreme Court of Louisiana
November 29, 1982

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX "B"

COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 13051

* * * * *

LOUIS J. BRAQUET, ET AL

V.

THE ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND

* * * * *

JUDGE PHILIP C. CIACCIO

* * * * *

(Court composed of Judges William V. Redmann, Israel H. Augustine, Jr., and Philip C. Ciaccio)

GERALD P. WEBRE
3408 Clearview Parkway
Metairie, LA 70002
Attorney for Plaintiffs-Appellants

CHAFFE, McCALL, PHILLIPS, TOLLER & SARPY
C. Manly Horton
Wiley G. Lastrapes, Jr.
3100 First NBC Building
New Orleans, LA 70112
Attorneys for Defendant-Appellees

AFFIRMED

Jul 30, 1982

PCC
WVR
IHA

Plaintiffs, the collateral relatives and presumptive intestate heirs of James Mitchell Rogers, have brought this action seeking revocation of the donation mortis causa by James M. Rogers to defendant, The Administrators of the Tulane Educational Fund (Tulane). Plaintiffs allege that Tulane failed to fulfill the condition imposed upon the legacy by the testator, i.e., the construction of a non-sectarian chapel on the campus of Newcomb College of Tulane University, memorializing decedent's late sister, Myra Clare Rogers. Following a trial on the merits, the trial court dismissed the plaintiffs' suit and the plaintiffs filed this devolutive appeal.

James Mitchell Rogers, testator, died in March, 1959. He left a last will dated July 9, 1954, which revoked all previous wills and bequeathed his entire estate to Tulane,

"for the construction of a non-sectarian chapel on the campus of Newcomb College of Tulane University. This chapel, which shall be of such size and design as to serve the needs of the University, shall be known forever and marked as the Myra Clare Rogers Memorial Chapel, and is given by me to serve as an everlasting memorial of her life and service to the community as a member of the faculty of Newcomb College."

Tulane, seized of all estate assets in 1959, successfully sued to invalidate a codicil prohibiting alienation of any real estate.[1]

In 1972 the same individuals who are plaintiffs-appellants in this action sued to nullify the donation mortis causa for Tulane's failure to build the chapel. Tulane had not commenced any type of construction. The trial court found defendant's delay unreasonable and granted Tulane a deadline within which to perform, fiz., 18 months to complete the chapel. This Court affirmed, but amended the trial

1. The present plaintiffs defended that action. Succession of Rogers, 138 So.2d 251 (La.App. 4th Cir.1962)

court judgment and ordered that construction begin within twelve months and that the chapel should be completed within 24 months, and, on rehearing, absent delays beyond Tulane's control. Braquet, et al v. The Administrators of the Tulane Educational Fund, 304 So.2d 720 (La.App.4th Cir. 1974).

On May 2, 1977, plaintiffs filed the instant suit seeking an accounting from Tulane alleging that the condition imposed by James M. Rogers upon the legacy has not been fulfilled. It is not disputed that funds derived from the James M. Rogers Estate were used by Tulane to construct a building which, on May 14, 1976, was dedicated and named the Myra Clare Rogers Memorial Chapel. The plaintiffs complain that this building is not in compliance with the will of the testator because it accomodates religious and non-religious activities and does not memorialize Myra

Clare Rogers.

Plaintiffs argue on appeal that certain facts concerning the nature of the chapel were decided in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, and are res judicata. Secondly, the plaintiffs argue that the testator's intentions were misinterpreted by the trial court so as to make them violate the Louisiana Constitution in that the building houses the Judeo-Christian Chair of Religion. Additionally, plaintiffs complain that the trial court erred in holding that Tulane has satisfied the intent of the testator by building the Myra Clare Rogers Memorial Chapel.

The issues presented for consideration on this appeal are (1) Did the holding in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, establish as res judicata facts concerning the nature of the chapel to be built? (2) Did the

trial court interpret the will as requiring the fulfillment of an unconstitutional condition? (3) Did the building of the Myra Clare Rogers Memorial Chapel fulfill the intent of the testator?

Res Judicata

Plaintiffs argue in brief that this Court's decision in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, established as res judicata that in order to fulfill the intent of the testator Tulane had to (1) build a traditional chapel (2) memorializing Myra Clare Rogers, and only her, (3) within 24 months of August 1, 1974.[2] Also established as res judicata by the decision in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, plaintiffs argue, was (4) that a multi-purpose building was

2. August 1, 1974 is cited by plaintiffs as the date when this Court's decision in Braquet became final.

not what the testator intended and (5) that the chapel was to be marked and forever known as the Myra Clare Rogers Memorial Chapel with a specifically worded plaque installed.[3]

---

3. In his will the testator expressed the inscription he desired to be placed on the memorial plaque: "I would like for a permanent plaque to be placed in the said Chapel indicating that the chapel is given in memory of Myra Clare Rogers, who was born on September 4, 1874, and died on May 30, 1932; who received the degress of Bachelor of Science (Newcomb College) in 1896 and Master of Arts in 1898 from Tulane University, and the degree of Doctor of Philosophy in 1928 from the University of Chicago; who in 1900 became an instructor in Latin in the Newcomb High School and later served as its principal until it was discontinued by the College in 1921 when she became Assistant Professor of Latin at Newcomb College in which position she served with grace and scholarly distinction until her death in 1932, and represented the tradition and qualities of womanhood which the College has exemplified; and that the Chapel is given in her memory by her devoted Brother, James Mitchell Rogers."

In Louisiana, res judicata is stricti juris; "a final judgment has the authority of res judicata only to those issues presented in the pleadings and conclusively adjudicated by the court." See: Lambert v. Maryland Casualty Company, 403 So.2d 739 (La.App.4th Cir.1981); Scurlock Oil Company v. Getty Oil Company, 294 So.2d 810 (La. 1974); McKean v. Campbell, 372 So.2d 652 (La.App.1st Cir.1979); New Orleans Mortg. Co., Inc. v. City of Kenner, 362 So.2d 1217 (La. App.4th Cir.1978); McNeal v. State Farm Mutual Automobile Ins. Co., 278 So.2d 108 (La.1973); Olsen Engineering Corp. v. Hudson Engineering Corp., 289 So. 2d 346 (La.App.1st Cir.1974). Louisiana application of the doctine of res judicata establishes a presumption of correctness and precludes re-litigation of the object of a judgment only when there is (1) identity of the parties, (2) identity of "cause", and (3) identity of the "thing"

demanded. La. Civil Code Art. 2286; Dornak v. Lafayette General Hospital, 399 So.2d 168 (La. 1981); R. G. Claitor's Realty v. Juban, 391 So.2d 394 (La.1980); Welch v. Crown Zellerbach Corp., 359 So.2d 154 (La. 1978); Mitchell v. Bertolla, 340 So.2d 287 (La. 1976). For these purposes "cause" refers to the fact or facts which give rise to the judicial relief sought. See: Lege v. United States Fidelity and Guaranty Company, 186 So.2d 670 (La.App.3d.Cir.1966), writ refused, 187 So.2d 448.

This Court in its opinion in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, at p.721, identified as the single issue presented "whether Tulane must return the legacy for failure to meet the condition of the onerous donation within a reasonable time." At the time of the rendition of the judgment by this Court in Braquet, et al v. The Administrators of The Tulane Educational Fund, supra, Tulane

had not commenced the building of any structure in connection with the Rogers legacy. The holding of this Court in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, at p. 724, ordered "defendant to complete construction of the Chapel within 24 months of the time this judgment becomes final or to take steps to place the plaintiffs herein in possession of the estate if the chapel has not been completed within the time allotted."[4] Neither the issue identified by the Court nor the holding of the court concerned the nature, type, quality, usage or specifications of the chapel that the testator intended Tulane to build.

4. On rehearing the order was amended to require completion of construction within 24 months, except for delays caused by circumstances beyond Tulane's control. Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, at 724.

The fact which gave rise to the judicial relief sought in Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, was the failure of Tulane to construct anything with the proceeds of the Rogers' estate. The fact which gives rise to this present case is plaintiffs' complaint that what Tulane has built is not the "chapel" intended by the testator.

There exists a lack of "identity of 'cause'" between Braquet, et al v. The Administrators of the Tulane Educational Fund, supra, and this present action. Plaintiffs' exception to certain facts as res judicata, therefore, cannot be sustained.

Interpretation of the condition imposed upon the legacy

Plaintiffs complain that the trial court misinterpreted the testator's inten-

tions so as to make them violate the Louisiana Constitution. The violations alleged by plaintiffs concern the creation of a Judeo-Christian Chair of Religion by Tulane, and the conducting of classes, lectures, and seminars in religion by Tulane, these activities taking place in the Myra Clare Rogers Memorial Chapel.

The will of James M. Rogers required as a condition of the legacy that Tulane construct a chapel memorializing his late sister Myra Clare Rogers. The will did not in any way prohibit or require Tulane to engage in any form of religion related academic instruction. A review of the court record in this case reveals that the trial court did not interpret the will as requiring Tulane to engage in any form of religious instruction. As such, the issue of whether Tulane's activities are constitutional is not properly a part of this action. It was not ruled upon by the

trial court and will not be considered by this Court. The real issue properly presented to the trial court and to this Court on appeal from the trial court's judgment is: Did the building by Tulane of the Myra Clare Rogers Memorial Chapel satisfy the intent of the testator?

Fulfillment of the testator's intent

The plaintiffs argue that the building erected by Tulane does not comply with the intent of the testator because the building facilitates both religious and non-religious activities and does not memorialize Myra Clare Rogers. In his reasons for judgment the trial court stated "that the intent of the testator has been clearly been fulfilled by the construction of a non-sectarian chapel in in memory of Myra Clare Rogers on the campus of Newcomb College of Tulane University." The question which this Court must answer is whether this factual determina-

tion by the trial court should be disturbed. The finding of the trial court should not be disturbed if the record establishes that the finding is not clearly wrong or manifestly erroneous. Canter v. Koehring Company, 283 So.2d 716 (La.1973); Arceneaux v. Domingue, 365 So.2d 1330 (La.1978).

The testament provides the best evidence of the testator's intent. Dated July 9, 1954, it bequeathed as follows:

> "I leave my estate existing at the date of my death to the Administrators of the Tulane Educational Fund for the construction of a non-sectarian chapel on the campus of Newcomb College of Tulane University. This chapel, which shall be of such size and design as to serve the needs of the University, shall be known forever and marked as the Myra Clare Rogers Memorial Chapel, and is given by me to serve as an everlasting memorial of her life and service to her community as a member of the faculty of Newcomb College."

The evidence at trial, both testimonial and documentary, established certain facts. Within the twenty-four month period established by this Court in Braquet,

et al v. The Administrators of the Tulane Educational Fund, supra, Tulane constructed the Myra Clare Rogers Memorial Chapel on the campus of Newcomb College of Tulane University. The chapel is used for traditional Catholic, Protestant, Jewish, Episcopalian and Baptist religious services, Inter-University Christian Fellowship, Judeo-Christian studies, weddings, baptisms, music-recitals, lectures, seminars and classroom instruction.

At trial, two clergymen prominently active in the University religious community testified regarding their participation in the planning, building and use of the Chapel. Father McInnes, a Roman Catholic priest, testified that "The function of the (planning) committee was to design a building which met the religious needs of the whole of the university on (an) ecumenical and intra-religious basis." (Tr.p.36.) Father

Smith, an Episcopal priest, testified "the chapel would be a place to meet the full spiritual needs of the people of the campus community and that included worship, teaching music, art, anything that helps a person transcend himself in relationship to God." (Tr.p.67) The remainder of the testimony of both these witnesses indicated that they felt the building constructed and its present use met their expectations and as such conformed with the role of a chapel "of such size and design at to serve the needs of the University."

Evidence at trial also established that a permanent plaque is placed in the main entrance vestibule proclaiming the building to be the Myra Clark Rogers Memorial Chapel.[5] Further, all literature

5. The evidence does not establish the exact words on the plaque and it is unclear whether the full content of the testator's desired wording is contained. See footnote 3. This does not, however, affect the court's holding.

and announcements concerning the chapel and activities held there identify the building as the Myra Clare Rogers Memorial Chapel or, at least, the Rogers Memorial Chapel.

The trial court, in his reasons for judgment, stated that "the construction of the Myra Clare Rogers Memorial Chapel, its size and its design as a University Chapel intended to facilitate traditional religious worship, as well as counseling and other academic functions, is not contrary to the testator's intent." The trial court's ultimate conclusion dispositive of the issue, as mentioned above, was "that the intent of the testator has clearly been fulfilled." A careful review of the entire record establishes that this finding is not clearly wrong. As such, pursuant to the guidelines for appellate review of facts in civil cases as enunciated in Canter v. Koehring Company, supra,

and Arceneaux v. Domingue, supra, this finding of the trial court will not be disturbed.

For the foregoing reasons the judgment of the trial court is affirmed. All costs are assessed to appellants.

A F F I R M E D

APPENDIX "C"

LOUIS J. BRAQUET, ET AL * NO. 6231

V. * COURT OF APPEAL

THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND * FOURTH CIRCUIT

* STATE OF LOUISIANA

***

APPEAL FROM THE CIVIL DISTRICT COURT OF THE PARISH OF ORLEANS "A". NO. 548-848 HONORABLE THOMAS A. EARLY, JR. JUDGE

***

EDWARD J. STOULIG
JUDGE

***

Aug 1, 1974

(Court composed of Judges Harry T. Lemon, Edward J. Stoulig and Judge Pro tempore Barob B. Bourg)

WINDHORST, HEISLER, DE LAUP & WYSOCKI
HENRY L. KLEIN
FREDERICK P. HEISLER
for plaintiffs-appellants

CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
C. MANLY HORTON, JR.
V. GERALD DEAN
for defendant-appellee

AMENDED AND AFFIRMED

HTL
EJS
BBB

Plaintiffs, the collaterial relatives and would-be intestate heirs of James Mitchell Rogers, instituted this suit to nullify a donation mortis causa to defendant, the Administrators of the Tulane Educational Fund (the board), alleging the donee failed to fulfill the condition imposed by the testator on the legacy, i.e., the building of a chapel memorializing decedent's late sister Myra Clare Rogers. Defendant, seized of all the estate assets in 1959, asserted in its answer it made some effort to begin construction during the 13 years that elapsed between decedent's death and the filing of this suit. The Rogers will imposed no time limit for construction, thus the primary questions before us is whether Tulane must return the legacy for failure to meet the condition of the onerous donation within a reasonable time.

The trial court dismissed plaintiffs' suit. In written reasons, after finding Tulane's efforts to fulfill its obligation imposed by the decedent unproductive and unreasonable, the trial judge granted defendant an additional 18 months to complete the chapel from the date this judgment becomes final. In so doing, he explained he was guided by the testator's expressed wish to have a chapel built on the Newcomb campus as a lasting monument to his sister. In effect, he found the delays unreasonable and gave the legatee a deadline within which to perform. Plaintiffs have appealed.

Decedent's sister served on the Newcomb College faculty from 1900 until her death in 1932. James Rogers, obviously devoted to his sister during her life and to her memory thereafter, expected the Tulane-Newcomb community

to fund and erect a memorial chapel, but this never materialized. Therefore, he left his entire estate for this purpose. His will, dated July 9, 154, contained this bequest:

> "I leave my estate existing at the date of my death to the Administrators of the Tulane Educational Fund for the construction of a non-sectarian chapel on the campus of Newcomb College of Tulane University. This chapel, which shall be of such size and design as to serve the needs of the University, shall be known forever and marked as the Myra Clare Rogers Memorial Chapel, and is given by me to serve as an everlasting memorial of her life and service to her community as a member of the faculty of Newcomb College."

Mr. Rogers knew his estate which he estimate at $150,000 would not be sufficient to build a chapel because he was advised by Mr. Clifford Favrot, a member of the Board, the cost would exceed $300,000. Mr. Rogers then expressed the opinion that Tulane was a wealthy institution and it could make up the difference. From past experience and

his knowledge of the university's policy of unrestricted funds for its development program, Mr. Favrot knew Tulane would not help fund the chapel but he did not so inform Mr. Rogers.

Mr. Rogers died March 14, 1959 and defendant was issued letters testamentary ten days later when his will was probated. An inventory taken April 13, 1959 listed real property at $60,000 and movables at $76,333.54. Before it could sell the real estate located in Louisiana, the Board successfuly sued to have a codicil invalidated that prohibited alienation of the real estate. That litigation became final Apri 19, 1962 when the Supreme Court refused an application for a writ of certiorari from this court's decision in Sucession of James Mitchell Rogers, 138 So.2d 251 (1962).

Tulane sold the real estate in 1962 and 1963 for $55,000. Dr. Clarence Scheps, then university comptroller, testified there was $168,200 available for construction of the chapel. This included Rogers' net estate, real and personal; insurance policy proceeds of $20,000 with Newcomb College the named beneficiary but which the defendant decided to dedicate to the Rogers Chapel fund; and interest earned by these funds.

It is clear from the record that these funds were adequate to finance construction of a chapel. In fact the chapel Tulane now proposes to build to satisfy the condition of the Rogers legacy could have been constructed in 1961 for

$150,000.[1] Edmond Bendernagel, resident architect at Tulane University, testified that plans were being studied at the time of the trial to construct an 8,000 square foot chapel for $230,000. This does not include furnishing and landscaping. That same structure could have been erected for $150,000 projected Mr. Bendernagel based on an F. W. Donnel building cost calculator. This reference reflects construction has increased 53.2 percent during this ten-year interval.

There was some indecisive action by the University officials between 1960 and 1963, including discussions, tentative sketches and expressions of an intent to

1. A Tulane University financial and statistical profile was distributed on January 11, 1961, which reflected that the chapel was the eleventh and last ranking in priority of objectives of the university and that construction was scheduled to begin in 1962 at a cost of $150,000.

solicit more funds to add to the chapel project. However the record does not support the unviersity's position that the lack of funds was the major reason why the chapel had not been built during the past 13 years. It does reflect that even as late as March of 1971 the Board of Administrators voted: "***deny the use for this project of any Tulane University funds other than the Rogers bequest and the Newcomb chapel fund, augmented by a solicitation that would not detract from general fund-raising efforts."

What delayed and deferred construction for so long was that Dr. Herbert Longenecker, Tulane president since September 1960, wished to use the Rogers legacy as partial funding for a $2.5 million religious center which would include a chapel. Dr. Longenecker testified a university chapel requires more than a liturgical worship center to

serve the needs of a university. He expressed the view that religious facilities on campus must include inter alia classrooms for study, an area for student counseling, a reading room-library in order to meet the student's religious requirements in a relevant way.

Thus, the first few years of planning to fulfill the condition of the Rogers bequest were unrealistic because President Longenecker was designing a $2.5 million project on a $168,000 budget. While there is testimony he attempted to solicit the balance from another source, his efforts to generate added funds were unfruitful. After this first round of discussions, the chapel remained dormant until 1970 and at that time Tulane began to consider construction more within the range of what the Rogers fund had to spend. This second series of meetings, discussions and studies underway by the

Board and several committees has produced nothing concrete in more than two years. The only affirmative decision reached is the chapel will be built near Newcomb Hall on the same site selected by the study groups considering the problem in the early 1960s.

From these facts, we conclude defendant failed to fulfill the condition upon which it was given the entire estate of decedent. The will specified no time for performance; therefore, under our decision in Bowers v. Roman Cath. Ch. of Diocese of New Orleans, 264 So.2d 329 (1972), we must determine whether a reasonable time for fulfilling the condition has elapsed. In the early planning stages, Tulane's president sponsored construction of a religious center geared to modern campus ministry that included numerous features beside the traditional liturgical worship center.

As commendable as this design was, we find it was not what the testator had in mind when he wrote his will. The primary purpose for giving the chapel was to memorialize Myra Clare Rogers, not to provide a building to meet the religious needs of the contemporary student. It is apparent from the record Dr. Longenecker's proposed religious center was the factor that prevented construction of the traditional chapel in the early 1960s at a cost that could have been supplied by the Rogers fund in 1963. An additional ten-year delay before building the chapel similar to the one the defendant would not consider in 1963 is unreasonable.

In summary, it affirmatively appears from the record that during the 1930s, Douglas Freret was appointed the architect for a proposed Newcomb Chapel. In 1960 after the death of Mr. Rogers, Freret was notified that the chapel

would definitely be constructed. Apparently all further consideration of the chapel construction was held in abeyance while an attempt was made to fund a $2.5 million University Religion Complex. In October 1970 the University Senate Committee on Physical Facilities was charged with formulating guidance plans for the architect. Mr. Freret, working with this committee, submitted various designs and concepts for the Rogers chapel in November and December 1971 and in April, August, November and December 1972; however, no formal plans were ever finalized. Subsequently Mr. Freret died and Mr. John Desmond was appointed to succeed him. As of August 15, 1973 (eight months after the institution of this suit) only an isometric site study represents the latest effort toward developing a plan for the Rogers chapel. No definite plan has been accepted by the Board, nor does

there appear to be an consensus of opinion as to a specific design for the chapel. We find the delay of 13 years is unjustified, unwarranted, inexcusable and totally unreasonable. It has producted the effect of thwarting the intention of the testator to have the chapel built during the lifetime of his deceased sister's contemporaries.

If reasonableness in execution of the condition imposed on the legacy were the only factor to be considered, we would order the executor to place the plaintiffs in possession and declare the legacy revoked for Tulane's failure to fulfill the condition. However, it is inescapable from reviewing the record that the testator's paramount desire was to build an "everlasting" memorial to the sister to whom he was so

devoted.[2]

LSA-C.C. art. 1712 charges us with the responsibility of ascertaining the will of the testator and to give it effect where possible. Therefore, while we

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2. In his will the testator expressed the inscription he desired to be placed on the memorial plaque:

"I would like for a permanent plaque to be placed in the said Chapel indicating that the Chapel is given in memory of Myra Clare Rogers, who was born on September 4, 1874 and died on May 30, 1932; who received degrees of Bachelor of Science (Newcomb College) in 1896 and Master of Arts in 1898 from Tulane University, and the degree of Doctor of Philosophy in 1928 from the University of Chicago; who in 1900 became an instructor in Latin in Newcomb High School and later served as its principal until it was discontinued by by the College in 1921 when she became Assistant Professor of Latin at Newcomb College in which position she served with grace and scholarly distinction until her death in 1932, and represented the tradition and qualities of womanhood which the College has exemplified; and that the Chapel is given in her memory by her devoted brother, James Mitchell Rogers.

conclude the test of reasonable execution under Bowers was not met, we think the mandate of C.C. art. 1712 must be given paramount consideration in the instant case. We will not declare the legacy revoked.

Because defendant has impeded performances of the condition and has produced no concrete evidence that plans for construction have been finalized, we cannot agree with the time limit set by the trial judge for beginning construction. This project has been studied and comitted and restudied sufficiently so that defendant should be able to perform without further delay the condition of the legacy if it intends to do so. We conclude the defendant is obligated to commence construction of the chapel within 12 months from the time this matter becomes final. If the project is not

completed within 24 months from the date this judgment becomes final, the executors at that time should render an accounting to plaintiffs herein and send them in possession of the Rogers estate and all interest earned by its investment over the years.

For the reasons assigned, the judgment appealed from is affirmed insofar as it denied plaintiffs' position to have the legacy to the defendant revoked immediately for nonperformance of the condition attached to its acceptance and is amended to order defendant to complete construction of the chapel within 24 months of the time this judgment becomes final or to take steps to place the plaintiffs herein in possession of the estate if the chapel has not been completed within the time allotted. Defendant is to pay all costs of this litigation.

AMENDED AND AFFIRMED